No. 79-1740

In The
Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLANTS' REPLY BRIEF

JON L. KYL (Counsel of record)
NEIL VINCENT WAKE
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5862

REX E. LEE
2840 Iroquois Dr.
Provo, Utah 84601
Tel. (801) 377-3049

Counsel for Appellants

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. INTRODUCTION	1
II. THE VIEWS OF THE APPELLEES AND THE *AMICI* CONCERNING THE ENTITLEMENT OF CUSTOMERS TO CONTROL THE DISTRICT NOT ONLY LACK ANY CONSTITUTIONAL BASIS; THOSE VIEWS ALSO OFFEND FUNDAMENTAL PROPERTY VALUES THAT ARE CONSTITUTIONALLY BASED	4
III. THE APPELLEES' ARGUMENTS DEMONSTRATE THAT THIS CASE FALLS WITHIN THE LETTER AND THE SPIRIT OF THE *SALYER* HOLDING	11
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	*Page*
Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973)	2,15
Avery v. Midland County, 390 U.S. 474 (1968)	5
Baker v. Regional High School District No. 5, 520 F.2d 799 (2d Cir. 1975)	13
Choudhry v. Free, 17 Cal. 3d 660, 552 P.2d 438, 131 Cal. Rptr. 654 (1976)	12,13
Cipriano v. City of Houma, 395 U.S. 701 (1969)	7,10
City of Mesa v. Salt River Project Agricultural Improvement and Power District, 92 Ariz. 91, 373 P.2d 722 (1962)	3,11
City of Mobile v. Bolden, _____U.S._____, 100 S.Ct. 1490 (1980)	15
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970)	10
Davis v. American Telephone and Telegraph Co., 478 F.2d 1375 (2d Cir. 1973)	3
Hadley v. Junior College District, 397 U.S. 50 (1970)	5
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)	6,7
Johnson v. Lewiston Orchards Irrigation District, 99 Idaho 501, 584 P.2d 646 (1978)	13
Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District, 78 Ariz. 30, 275 P.2d 393 (1954)	3,4
Niedner v. Salt River Project Agricultural Improvement and Power District, 121 Ariz. 331, 590 P.2d 447 (1979)	5,11
North Carolina v. Alford, 400 U.S. 25 (1970)	14

TABLE OF AUTHORITIES (Continued)

CASES *Page*

Pinetop v. Ferguson, No. 1 CA-CIV 4567 (Ariz. App. September 30, 1980) 14

Reynolds v. Sims, 377 U.S. 533 (1964) 2,5

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) 2,3,4,5,6,10,15,16,18,19

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 20

Town of Wickenburg v. Sabin, 68 Ariz. 75, 200 P.2d 342 (1948) 17

Uhlmann v. Wren, 97 Ariz. 366, 401 P.2d 113 (1965) 14

Wright v. Town Board of Carlton, 41 App. Div. 2d 290, 342 N.Y.S. 2d 577 (1973) 13

STATUTES

United States Code

16 U.S.C. §§ 2601-2645 17

Arizona Revised Statutes

§§ 40-360.01, *et seq.* (Supp. 1980) 17

§ 45-172 (Supp. 1980) 12

§ 45-903 (A) (6) (1956) 14

§ 45-903 (A) (7) (1956) 14

§ 45-1065 (Supp. 1980) 17

ARGUMENT

I.

INTRODUCTION

This lawsuit, despite its procedural cast as a "voting" case, is actually a challenge to substantive legislative policy choices effectuated by the acreage control system. Since the legislative policy which the appellees would subvert is primarily one of encouraging reclamation through private economic risk and reward and of protecting those economic benefits by acreage voting, this lawsuit is also an attempt to expropriate heretofore protected property rights. Thus, it can fairly be viewed as a request for social and economic policy legislation. It also seeks judicial redistribution of property value from those who earned it to those who have neither earned it in the past nor succeeded in persuading their one-person, one-vote legislature to transfer it to them for the future.

The appellees do not dispute that their requested relief will frustrate the historic reclamation priorities and the associated property expectations of the acreage control system. Indeed, to distract this Court from the substitution of judicial for legislative policy preferences, the appellees baldly assert that somehow, notwithstanding the legislature's refusal to abandon the primary reclamation purposes of the District, "the District's electric operations have an independent existence fully separate and distinct from its water activities." Brief of Appellees at 19. Like the Court of Appeals,[1] they would avoid confessing this usurpation of legislative policy choices by pretending that the legislative choices themselves have changed to subordinate water reclamation and investment protection to servicing the public with electricity and domestic water. This new purpose and priority, discovered out of thin air, is absolutely contrary both to the stipulated facts and to directly controlling Arizona case authority.

---

[1] 613 F.2d at 184, *quoted in* Brief of Appellants at 27-28.

The *amici* are more candid in stating that the object of this lawsuit is to achieve by indirection an amendment of the legislative purposes of the District.[2] It is remarkable that some of the very purposes sought to be substituted here (flood control for water storage, environmental enhancement for reclamation) were also the very purposes which the unsuccessful plaintiffs in *Salyer*[3] and *Associated Enterprises*[4] hoped to achieve by their "voting rights" suits.

Voting—in the sense of participating in government—is a fundamental right for purposes of the Equal Protection Clause. It is so because it is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Voting for the Arizona legislature or the Phoenix City Council is that type of voting. But some other entities exist in our society, created under state law, in which control is exercised by "voting" different from the voting which is a fundamental right. American Telephone and Telegraph Company is an artifical entity created by the laws of New York, with enormous economic effects on millions of people, and controlled by a system of voting ordained by the New York legislature. Nevertheless, voting in AT&T is not a fundamental right, and the State of New

---

[2] For example, one of the *amici* "has for five years opposed the transfer of funds from District electric revenues to subsidize water use." Brief of *Amici Curiae* at 4. Another *amicus* "would like to see the District seek broader authority to utilize its dams to provide more than incidental flood control." *Id.* Another represents people who live in or near a usually dry river bed and whose land values depend on an assured absence of water rather than its assured supply. This *amicus* specifically desires, through this lawsuit rather than purchase or condemnation, to divert the storage capacity of District dams and to reverse the 70 years' policy under which "the District retains maximum amounts of water for agricultural irrigation rather than to utilize the dams in a multipurpose manner including the provision of flood control for the Phoenix metropolitan area." *Id.* at 6.

[3] *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

[4] *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973).

York is not constrained by one-person, one-vote principles when devising voting systems for AT&T.[5]

Similarly, other artifical entities exist which, though labeled municipal by state law, are in purpose and effect much like AT&T and not at all like the City of Phoenix. *Salyer* holds that "voting" in these entities is not a fundamental right and not subject to the one-person, one-vote strictures applicable to political and governmental entities.

This lawsuit is grounded on an historical circumstance of labels. As a matter of legislative intent,[6] actual causal motivations of its creators,[7] economic reality,[8] effects upon the public,[9] Arizona case law,[10] and stipulation of the parties to this suit,[11] this District is "essentially a business corporation,"[12] notwithstanding the District's "municipal" label under state law. That mere label does not render voting in *this* entity a fundamental right of equal dignity with freedom of speech, freedom of religion, and voting for state legislators. *Salyer* necessarily holds that a "municipal" categorization under state law does not *ipso facto* bring with it real political or governmental status and therefore strict scrutiny of control systems.

---

[5] *Davis v. American Telephone and Telegraph Co.*, 478 F.2d 1375 (2d Cir. 1973).

[6] Brief of Appellants at 21-24, 26-28.

[7] Facts ¶¶ 32, 33, 34; J.A. at 31.

[8] Brief of Appellants at 21-24, 26-28.

[9] Brief of Appellants at 24-26.

[10] Brief of Appellants at 21-24, 26-28.

[11] Facts ¶¶ 32, 33, 34; J.A. at 31.

[12] *City of Mesa v. Salt River Project Agricultural Improvement and Power District*, 92 Ariz. 91, 103, 373 P.2d 722, 731 (1962); *see Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402 (1954).

The issue in this case is whether the appellees have a fundamental right which is violated by this District's acreage control system. But the issue is not whether "voting" is a fundamental right. It is whether *customer* voting in a business entity created by private risk and fostered by the state is a fundamental right.

Analysis of the Brief of Appellees reveals two controlling deficiencies: (1) there is no constitutional basis for the attempt to gain customer control of the District, and (2) appellees' own argument demonstrates that this case falls within the letter and spirit of *Salyer*.

II.

THE VIEWS OF THE APPELLEES AND THE *AMICI* CONCERNING THE ENTITLEMENT OF CUSTOMERS TO CONTROL THE DISTRICT NOT ONLY LACK ANY CONSTITUTIONAL BASIS; THOSE VIEWS ALSO OFFEND FUNDAMENTAL PROPERTY VALUES THAT ARE CONSTITUTIONALLY BASED.

As noted, the *amici* have been more candid than the appellees in acknowledging the purpose of this lawsuit and its effects, if successful. Relying on the state constitutional provision denominating the District a politicial subdivision, they assert that "the District does not belong to private owners; it belongs to the public." Brief of *Amici Curiae* at 9. This forthright statement has always been an essential foundation stone of the appellees' case.

There are at least three answers to the assertion that the District belongs to the public. The first is that the assertion is totally contrary to specific statements of the Arizona Supreme Court. In *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. at 44, 275 P.2d at 402-03, the court said:

> The public does not own the District. . . . Instead the owners are private landowners. . . . The public interest is merely that of consumers of its product, for which they pay. . . .

That characterization of the District has been reiterated as recently as 1979 in *Niedner v. Salt River Project Agricultural Improvement and Power District*, 121 Ariz. 331, 333, 590 P.2d 447, 449 (1979).

The second answer is that the assertion of public ownership begs rather than answers the constitutional question. Merely calling an entity a political subdivision does not automatically entitle the public to "own" and control it. The heart of this Court's holding in *Salyer*, and its earlier dicta in *Avery*[13] and *Hadley*,[14] is that the strict judicial scrutiny rule of *Reynolds v. Sims* is inapplicable to some subdivisions of government—those special districts whose functions are limited and do not involve core governmental responsibilities. Because of the narrowness of its functions, the Salt River Project qualifies as such a special district. Therefore, it is outside the reach of *Reynolds v. Sims'* strict scrutiny standard.

The appellees have abandoned the assertion in their Motion to Affirm at 12 that the District has "all the attributes of sovereignty." They now argue that "towns, shops and hospitals are located within its boundaries." Brief of Appellees at 21. So are streets, schools, fire and police departments and the entire panoply of normal governmental activities. But these activities are not carried out by the District. The District's activities are limited to the conservation, storage, and delivery of raw untreated water, and electric service which provides the support for those water

---

[13] *Avery v. Midland County*, 390 U.S. 474, 483-84 (1968).

[14] *Hadley v. Junior College District*, 397 U.S. 50, 56, 58-59 (1970).

operations.[15] This Court has held that neither of those endeavors amounts to normal governmental activity.[16] Everything this District does is also done by similar private business corporations. Indeed, everything this District does *was done* by a private business corporation (the Association) before the District was formed as its mirror image.

All of appellees' discussion concerning the distinction between urban and rural water uses is beside the point, unless *Salyer* is to be overruled. This Court has never suggested that a special district loses that status because it

---

[15] The appellees' most recent attempt to avoid the controlling stipulation that the electric operation is subsidiary to the District's primary water reclamation function is found in Brief of Appellees at 18 n.14, which asserts that the *initial* purpose was reclamation but that during the interim the electric power activities have acquired an independent significance. This latest attempt to explain away this dispositive fact is no more adequate than the earlier ones. (*See, e.g.*, Motion to Affirm at 3 n.2.) The stipulations deal not only with the District's original purpose (Facts ¶¶ 16, 17; J.A. at 24-25) but also with the present. Facts ¶ 34 (J.A. at 31) stipulates:

> . . . Subsequent to its formation in 1937, the District *has continued* to use electric revenues to defray the expense of providing water to District lands. The primary legislative purpose of the District *is* to provide water to District lands. (Emphasis added.)

[16] *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. at 728-30; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The appellees would apparently distinguish these cases on the ground that the District engages in delivery and conservation of underground as well as surface water. There is nothing in the *Salyer* opinion, nor in logic, which suggests that the special district status of a district engaged in water conservation and delivery activities diminishes where the source of its water is underground as well as surface.

serves some urban areas.[17]

The appellees' reliance on *Cipriano v. City of Houma*, 395 U.S. 701 (1969), is completely misplaced. The distinction between this case and *Cipriano* is that the City of Houma is a city with the full range of governmental powers. A city already belongs to the public. All its functions, when performed by a city, are public, not because of any public nature of the function itself, but because of the purely public, governmental nature of the entity. There is no suggestion in *Cipriano* or any other case that the sale of electricity confers the general governmental status that requires control of the enterprise by the customers. *Jackson v. Metropolitan Edison Co.* holds to the contrary.

The third reason for the insufficiency of the assertion that "the public owns the District" is that it results in confiscation. The funds for the creation of this District were provided by debt incurred by the landowners and secured by their lands and by acreage assessments. The only public money came from the United States, and that was in the form of loans, which the landowners were obligated to repay. The assertion of public ownership over a district whose risk capital came from private investors rather than tax revenues would jeopardize basic Fifth Amendment values. Both in its creation and in the satisfaction of its continuing need for funds there is no material difference between the financial arrangements of the Salt River Project and those of any other investor-owned utility, or, for that matter, any other profit-motivated enterprise. In the typical case of entrepreneurial risk-taking, the initial investment capital is provided by the owners, involving a combination of equity capital and debt. (Equity capital usually comes from sales

[17] The statement that the "District's water operations are only partially related to land ownership because 40% of District water is used for urban purposes" (Brief of Appellees at 22) is both a non sequitur and false. The District's water operations are in fact "related to land ownership" precisely because the entitlement to the water depends *exclusively* upon land ownership. This is no less true for urban lands than for any others.

of stock; here it came from acreage assessments.) Once the venture gets underway, customer sales are the principal source of operating funds; periodic expansion and other unusual needs are met either through retained earnings or additional capital investment, shareholder contribution or shareholder borrowing. Of the three groups whose money is involved in the venture—owners, creditors, and customers—the owners bear the greatest risk; and the customers bear none. The necessary accompaniments to this risk are the right to control the enterprise, and the right to the profits, if any.

The appellees' views concerning risk are incredibly naive: "The landowners have invested none of their own money in District operations. Their 'risk' is limited to the lien on District land . . . ." Brief of Appellees at 23. The statement is inadequate for two obvious reasons. First and most important, risk capital does not lose its quality as such simply because it is supplied by those who borrow money against the security of their property. Second, even in the narrow sense intended by appellees, the statement is false. While most of the money to build the Project came from borrowing—either from the United States or from bondholders—some came from acreage assessments imposed on the Project's landowners.

Once again, the *amici* are more forthright. They acknowledge, as any objective observer must, that the Salt River Project was built through landowner risk, but they contend that "those landholders have been well compensated for their risks . . . through the enhancement of the value of their lands." Brief of *Amici Curiae* at 10. The obvious import of this argument is that the owners have made their investment and for a period of time have had a return on it. Now it is time to turn it over to the public. This suggestion is tantamount to nothing less than expropriation. The obvious reason for the "enhancement of the value of their lands" is the water subsidy. (Facts ¶ 55; J.A. at 39.) Removing or altering that subsidy would affect land values just as surely as customer control over Arizona Public Service's

dividends would affect the value of its stock.[18] The notion that property rights in investment capital are protected from public confiscation only for a finite initial period, after which they may be taken over by the public, is irreconcilable with the Fifth Amendment's just compensation clause.

The appellees have another argument: that whatever may have been the case initially, today the money that operates the Salt River Project comes from the ratepayers, whose electric payments account for 98% of the District's revenues. The revenues to which appellees refer are sales revenues; 98% of total District revenues comes from electric sales and 2% from water deliveries. The short answer to this argument is that when he pays his monthly bill the electric customer is paying only for electricity. He is not making a capital acquisition. In this respect as in many others, the District's electric customer is identical to any other electric customer. The stipulated facts show that there is no material difference between the District's rates and those of other investor-owned utilities. (Exhibit K, pp. 4-30; Exhibit L, p. 1.) Moreover, the return on investment to the District's landowners is about the same as the dividends paid to common stockholders in comparable electric utility companies. (Facts ¶ 56; J.A. at 40.)

In light of these stipulated facts, the fact that 98% of the District's sales revenues comes from electric customers is irrelevant. In the case of Arizona Public Service and Tucson

---

[18] Appellees argue that, since the District's general obligation bond covenants require that rates always be sufficient to pay off bonds, there should be no concern that a popularly-elected board would lower rates to the point that an acreage assessment or acreage tax would ever have to be imposed. Brief of Appellees at 24 n.17. But they ignore the fact that the bond covenants do not require rates sufficient to maintain existing levels of efficiency of and support to the water system. This is the primary concern here. Consequently, destruction of the water subsidy, and therefore of land values, could occur without any violation of the bond covenants.

Electric Power, 100% of sales revenues comes from electric customers. That does not give those customers a constitutional right to control the company, or any other ownership interest.

A similar argument is that the amount of general obligation bond debt secured by Project lands is diminishing and that shortly after the turn of the century all of the general obligation bonds will have been retired. This argument is also deficient for several reasons. First, *Salyer* requires disproportionate effect on landowners. In the case of the District, the disproportionate effect is found principally in the benefit (earned through risk and investment) to Association-subscribed lands. This disproportionate benefit is an effect that is independent of the bond liens. This benefit is also another feature that distinguishes the instant case from *Cipriano* and *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). Apart from the fact that the primary disproportionate effect of the District is the benefit conferred on landowners, appellants have never suggested that the acreage voting system rests on revenue bond obligations or even that it rests strictly on the burden of general obligation liens (though they cannot be considered insignificant since current bonds will remain outstanding for another quarter of a century, and new general obligation bonds could be issued). (*See* Facts ¶ 43; J.A. at 35.)

The contention that "time after time, this Court has stressed the relevancy of present facts over the past" (Brief of Appellees at 34) overlooks the controlling fact that in this case—unlike any of those discussed by the appellees—the past history of the Salt River Project includes landowner investment. This District was created when a private corporation transferred its assets and powers to take advantage of tax-free bonding for additional financing. No decision of this Court has ever suggested that the Constitution precludes the traditional cornerstone of free

enterprise that investment includes risk, benefits, and control. This is no less true merely because the state also has conferred an economic benefit in order to foster a legitimate state policy—in this case, reclamation.

There is no constitutional requirement of customer control; indeed, it would result in confiscation of landowner property rights.

III.

THE APPELLEES' ARGUMENTS DEMONSTRATE THAT THIS CASE FALLS WITHIN THE LETTER AND THE SPIRIT OF THE *SALYER* HOLDING.

Appellees consistently attempt to avoid the stipulations that water reclamation is the District's primary purpose and that the sale of electricity is subsidiary to it. Implicit in this attempt is a recognition that under *Salyer* the selection of the board of directors for a water reclamation project is governed by the rational basis test. The appellees also recognize that historically the Salt River Project has been a reclamation project, and that the Arizona courts say it still is.[19] Their responses are that this Court should disregard the Arizona courts' characterizations (and the stipulations) and make its own determination that the original purpose of the District has changed. Brief of Appellees at 32.

In view of the fact that constitutionality turns on function, not size of the district, just how has this District changed? The fact that it sells electricity? Or the fact that it delivers water to cities, who in turn treat and deliver the water to its owners? Electric sales as a subsidy for reclamation have been an integral part of the Salt River Project's reclamation operations almost from the beginning—decades before there was a District. One of the obligations imposed on the Association by the United States in the 1917 contract was the responsibility "for the service of electric

---

[19] Brief of Appellees at 32; *City of Mesa v. Salt River Project Agricultural Improvement and Power District*, 92 Ariz. at 103-104, 373 P.2d at 731; *Niedner v. Salt River Project Agricultural Improvement and Power District*, 121 Ariz. at 332, 590 P.2d at 448.

energy."[20] With respect to water, the District simply is not in the same category as the Imperial Irrigation District in *Choudhry v. Free*, 17 Cal. 3d 660, 552 P.2d 438, 131 Cal. Rptr. 654 (1976), which "supplies all the water and electrical power needs of Imperial County, and to portions of Riverside and San Diego Counties."[21] The result in *Choudhry* was mandated by several factors entirely absent from

---

[20] Exhibit C, p. 1.

[21] 17 Cal. 3d at 663, 552 P.2d at 440, 131 Cal. Rptr. at 656. The District's water functions are much more analogous to *Salyer* than to *Choudhry*. Appellees attempt to create a contrary impression. They claim that, "The Arizona Legislature has vested the District with many special and significant powers over water allocation and management not only within, but also beyond, the District's geographic area." Brief of Appellees at 6. The statute cited does not support the claim that District water powers are either special or significant. Ariz. Rev. Stat. § 45-172 (Supp. 1980) is a section of the surface water code which sets out the circumstances under which certain vested water rights may, with the approval of and subject to conditions imposed by the Director of the State Department of Water Resources, be severed from appurtenant land and transferred to other places of use. One of the many conditions is that if the water right is appurtenant to land within the boundaries or watershed of an irrigation district, agricultural improvement district, or water users' association, the district or association must approve (obviously to protect the water rights of the landowners within its area) any severance and transfer. That obligation is neither special to this District nor as significant as other water powers the District readily acknowledges.

this case.[22] This District delivers raw water to the cities, not on the basis of need, but on the basis of entitlement, both in the cities' own right as landowners and on behalf of those landowner residents who have designated the cities as agents for the purpose of receiving water. The cities pay the same delivery charge per acre foot for raw water as any other landowner. Persons living within the cities but outside Project boundaries are not entitled to Project water and they receive none.

The request that this Court make its own determination concerning the District's purposes, priorities, and powers necessarily asks either for original findings of fact contrary to the stipulations (especially ¶¶ 16, 17 and 34; J.A. at 24-25, 31), or an interpretation of the Arizona statutes contrary to the interpretations of the Arizona courts. The appellees concede that the holdings of those courts are at odds with their positions: "The historic purpose and categorization of the District by Arizona Courts are not and

---

[22] Perhaps the most important was that district's wide-ranging co-equal purposes, which included power sales and flood control "without regard to whether such functions are ancillary to irrigation," water treatment, sewage disposal, recreation, and sale of water for fire protection, irrigation, and domestic use. 17 Cal. 3d at 663, 667, 552 P.2d at 439-40, 442-43, 131 Cal. Rptr. at 657, 658-59. Rather than merely delivering water to land to which it is appurtenant (as is the District's function here), the Imperial District actually allocates water between agricultural and nonagricultural uses. 17 Cal. 3d at 665, 552 P.2d at 441, 131 Cal. Rptr. at 657. None of these activities are authorized for the District here, let alone elevated to a co-equal status with delivery of water to its owners.

The other cases cited in Brief of Appellees at 11 n.12 are different from this case. *Baker v. Regional High School District No. 5*, 520 F.2d 799 (2d Cir. 1975), involved a school board performing "what has traditionally been a vital governmental function." 520 F.2d at 801. The primary purpose of the entities in *Johnson v. Lewiston Orchards Irrigation District*, 99 Idaho 501, 584 P.2d 646 (1978), and *Wright v. Town Board of Carlton*, 41 App. Div. 2d 290, 342 N.Y.S. 2d 577 (1973), was the supply of domestic water, not raw water to which landowners had a legal entitlement based on their land ownership. In neither of those cases was there a disproportionate effect on landowners comparable to the agricultural water subsidy in this case.

cannot be disputed."[23] Appellees would dismiss those holdings with a line of dictum from a criminal case, *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). The question here, unlike that in *Alford*, concerns the powers and purposes of special districts created by Arizona statutes. The interpretation of Arizona statutes is the exclusive province of the Arizona courts.[24]

Thus, the only relevant change in the District is the undisputed fact that it now serves more customers than in the past, and that more of them live in cities. The Brief of Appellants points out three reasons—based on precedent, policy, and practicality—why the selection of the governing

---

[23] Brief of Appellees at 32. The most recent pronouncement concerning the highly limited nature and function of Arizona special districts was handed down September 30, 1980, by the Arizona Court of Appeals in *Pinetop v. Ferguson*, No. 1 CA-CIV 4567:

> In our opinion, the adoption of Art. 13, § 7 was never intended to change the basic nature of improvement districts or to grant them governmental powers on a par with cities, counties or the state itself. We do not read it as vesting them with any powers or privileges above and beyond those strictly necessary to carry out their limited functions. In fact, cases construing this constitutional provision have taken great pains to distinguish the limited proprietary purposes of such improvement districts from the primarily governmental functions of other government entities. *Taylor v. Roosevelt Irrigation District* [71 Ariz. 254, 226 P.2d 154 (1950)]; *Santa Cruz Irrigation District v. Tucson*, 108 Ariz. 152, 494 P.2d 24 (1972); *City of Mesa v. Salt River Project*, 92 Ariz. 91, 373 P.2d 722 (1962); *Valley National Bank v. Electrical District No. 4*, 90 Ariz. 306, 367 P.2d 655 (1961).

[24] Among the controlling holdings of the Arizona Supreme Court is its statement from *Uhlmann v. Wren*, 97 Ariz. 366, 383, 392, 401 P.2d 113, 124, 130 (1965), that the District's power activities could only be "an incidental phase of reclamation, not a primary or independent end in itself," because the only reason for sale of power is "the use of power revenues to support its primary irrigation and reclamation functions." Appellees' wholly unprecedented suggestion that Ariz. Rev. Stat. §45-903(A)(6) permits independent District power sales unrelated to support of reclamation is rejected by the holding in *Uhlmann v. Wren*, 97 Ariz. at 372, 401 P.2d at 116, and the stipulated facts. The historical fact is that the District engages in power activities under Ariz. Rev. Stat. §45-903(A)(7) "to reduce the cost of development, storage and distribution of water to District lands." (Facts ¶ 34; J.A. at 31.)

constitutional standard should continue to turn on function rather than size. The Brief of Appellees highlights an additional reason why the difference on which the appellees rely—the number of people served by the District—makes the case for constitutionality stronger here than in *Salyer*.

Any objective comparison of this case and *Salyer* in terms of (1) the magnitude of the effects on the individual and (2) the ability of the individual to do anything about those effects, compels the conclusion that constitutionality here follows *a fortiori* from the holding in *Salyer*. The reason for that result is the very feature of this case that the appellees and the Court of Appeals find so objectionable: the size of the Project and the number of people it serves.

The people served by the Salt River Project are the same people who elect Arizona's policy makers. The appellees correctly point out that the number of those people is large and growing. Included within the District's boundaries are all or part of seventeen of the State's thirty legislative districts. Among the legislative leaders who live in these districts are the Senate President, House Speaker, and both Senate and House Majority Leaders. To whatever extent the District's customers share the substantive views of the appellees and the *amici* they can make their views felt through the people who have defined the narrow purposes of the District,[25] the elected members of the Arizona legislature. As stated by Justice Stevens, concurring in the judgment in *City of Mobile v. Bolden*, _____ U.S. _____, 100 S.Ct. 1490, 1508, 1511 (1980): "For the political strength of a group . . . is a function of numbers—specifically the number of persons who will vote in the same way."

In *Salyer*, some of the individual interests were enormous, involving nothing less than the security of home and job, yet the individuals had no power to effect changes. One corporation effectively controlled the district. Even more

---

[25] *See Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. at 744-45.

important, since the number of persons living within the Tulare Lake Basin Water Storage District was small, their chances of bringing about any legislative change were limited. Although there were adverse impacts on the people actually living within the district, the Court upheld the acreage voting system.

And what are the adverse impacts on the individuals in this case? Despite an invitation in the Brief of Appellants, the appellees have never identified just how their interests are adversely affected by the District. They have merely stated that they would like to control the District, and pre-

sumably they would like lower electric rates.[26] However, even if the agricultural water subsidy were entirely eliminated, the average cost saving per electric user would be considerably less than $1.00 a month. The *amici* are a bit more forthright. Some would like the District to be more active in flood control. Others want to get the district out of fossil fuel and nuclear generation, while still others feel that the District's environmental efforts have been insufficient.

---

[26] Though they do not make clear precisely how it would be relevant to the constitutional analysis, appellees emphasize that electric rates set by the District are not reviewed by the Arizona Corporation Commission, as are the rates of private electric utilities. Brief of Appellees at 8-9. Of course, the Constitution does not require the states to regulate all similarly situated businesses in identical ways. Arizona's experimentation in regulating the District differently from other private utilities is within its range of discretion. Indeed, the fact that District electric rates have always been comparable to or lower than those of private electric utilities regulated directly by the Corporation Commission suggests the soundness of the State's decision that District electric rates need not be directly set by the Commission.

Moreover, the appellees have never argued that they are hurt by the absence of Corporation Commission rate regulation. The reasonableness of District electric rates has never been challenged in court by the appellees or anyone else. In fact, the innuendo of the Brief of Appellees at 9 that there is no judicial review of District electric rates is false. Even though District rates are not set directly by the Corporation Commission, municipal utility rates are subject to judicial review in the Superior Court and will be upset if they are unreasonable. *Town of Wickenburg v. Sabin*, 68 Ariz. 75, 200 P.2d 342 (1948).

Appellees also neglect to inform the Court that, by virtue of the nexus between the District's power activities and the federal reclamation project, the Secretary of the Interior has comprehensive power to supervise the District's management of the Salt River Project, "including the power operations." (Facts ¶ 59; J.A. at 40-41.) The Secretary has never found it appropriate to revise rates set by the District. *Id.* The District is subject to other types of state and federal regulation. *E.g.*, Ariz. Rev. Stat. § 45-1065 (Supp. 1980) (subjecting issuance of District revenue bonds to Corporation Commission approval); Ariz. Rev. Stat. §§ 40-360.01, *et seq.* (Supp. 1980) (subjecting District plant and power line siting to regulation by the Power Plant and Transmission Line Siting Committee); 16 U.S.C. §§ 2601-2645 (the Public Utility Regulatory Policies Act of 1978, requiring study of numerous rate procedures and rate structures by many utilities, including the District.)

The appellees observe that changes have occurred in the eighty years of the Salt River Project's existence and that "these changes . . . have been facilitated practically every step of the way by the Arizona Legislature through amendments to the District's enabling act." Brief of Appellees at 4. Choices between opposing points of view on the kinds of issues raised by the appellees are the essence of the legislative process. Moreover, the choices in this case are highly localized; the people affected are the people of the State of Arizona. Nowhere is there any suggestion that the Arizona legislature has not or cannot facilitate necessary or desirable policy choices without judicial mandate.

Deference to legislative judgment is the cornerstone of the rational basis standard, which, as discussed in the Brief of Appellants at 18 and 37, should govern this case. For reasons discussed more fully in the opening brief, especially part III, it was reasonable for Arizona to adopt and implement a policy that encourages landowner investment in reclamation activities, with concomitant public benefits such as increased total available water and encouragement of land use for agricultural purposes. Judicial deference to the legislative judgment is particularly appropriate in this case because the appellees' interests in the Salt River Project are mostly economic, and economic policy issues are the province of the legislature. The difference between this case and *Salyer* is a difference in the number of people served. If the difference matters at all, it makes this case even more appropriate than *Salyer* for application of the rational basis test because the consumers' greater numbers

allow them to influence the State's legislators.[27]

CONCLUSION

This case can and should be decided on the narrow ground that *Salyer* governs and that the District's representational scheme, which is acreage based but partially customer oriented, satisfies the rational basis test. This Court's test properly focuses on function rather than size; to the extent size may be relevant at all it strengthens the case for constitutionality. The effect of such a holding would be to leave the underlying issues of legislative policy to the legislature.

The legislative process, unlike the constitutional adjudication process, has the capability for fine tuning adjustments as well as massive change. For almost half a century the Arizona legislature has expressed its policy supporting and facilitating private investment in reclamation. While the basic policy has been repeatedly reaffirmed, numerous modifications in implementation of the policy have been made by legislative amendments over the years, including modification of the voting statutes for agricultural improvement districts. It is the legislative process that has functioned and should continue to function in the gov-

---

[27] The appellees call into question the reasonableness of another feature of the District's voter representation by informing the Court that the owners of 40% of lands within the District are not entitled to vote those lands. What they do not inform the Court is that the excluded lands are "streets, alleys, canal rights-of-way, and the Salt River riverbed." (Facts ¶ 35; J.A. at 31-32.) In addition, property held by corporations and municipalities or other governmental bodies may not be voted, "but property held by municipalities or other governmental bodies is not subject to the District's taxing power." *Id.* The exclusion of municipal property and corporate property clearly satisfies the rational basis standard, if for no reasons other than the municipal immunity from District taxation and the reasonableness of the judgment that District electors should meet the qualifications of state electors in general. Moreover, if exclusion of corporate and municipal lands were constitutionally deficient, the remedy would be a judgment enfranchising those lands, a remedy which the appellees have not sought, and which, at least as to corporations, they expressly disclaimed before the Court of Appeals.

ernance of the Salt River Project. The closing sentence of this Court's opinion in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 59 (1973) is particularly appropriate:

> But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

The judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

JON L. KYL
NEIL VINCENT WAKE
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5862

REX E. LEE
2840 Iroquois Dr.
Provo, Utah 84601
Tel. (801) 377-3049

Counsel for Appellants

January 1981